

State is required to meet such a heightened causation standard is a prime example of the type of argument that the State seeks to preclude through its Motion *in Limine*.

2. “With respect to environmental nuisances, such as pollution of a stream or pollution of the air surrounding a community, courts have commonly found that such pollution constitutes an indivisible injury.” *Herd v. Asarco, Inc.*, 2003 U.S. Dist. LEXIS 27381, at *41 (N.D. Okla. July 11, 2003), *vacated in part by Herd v. Blue Tee Corp.*, 2004 U.S. Dist. LEXIS 30673 (N.D. Okla. Jan. 13, 2004)¹ (citing *Union Tex. Petroleum Corp. v. Jackson*, 909 P.2d 131, 149-50 (Okla. Civ. App. 1995), *Harper-Turner Oil Co.*, 311 P.2d at 950-51 and *U.S. v. Pess*, 120 F.Supp.2d 503 (W.D. Pa. 2000)). In denying the defendants’ various motions for summary judgment regarding causation, the *Herd* Court held and reasoned as follows:

Once the lead-laden dust reaches the air stream, it is impossible to trace its precise source. The Court therefore finds that the alleged injury is indivisible and that the . . . legal principles regarding joint and several liability apply. To the extent Defendants argue that they are entitled to summary judgment on grounds that Plaintiffs have failed to allege facts that ‘trace’ or ‘quantify’ the lead-laden dust causing the alleged nuisance in this case as to each individual Defendant’s chat pile(s) or tailing pond(s), the Court finds that, under the facts present here, such tracing or quantification is not required.

Herd, 2003 U.S. Dist. LEXIS 27381, at *41-42; *see also id.* at 44-46. The *Herd* decision is on point. In this case, it is simply not possible for the State to trace or pinpoint the precise source of each molecule of phosphorus or bacteria that has made its way to the waters of the IRW. And the State is not required to do so as a matter of law.

¹ After a settlement was entered among the *Herd* plaintiffs and defendants Blue Tee Corp. and Gold Fields Mining Corp., the July 11, 2003 order was vacated as to *those two defendants only*. *See Herd v. Blue Tee Corp.*, 2004 U.S. Dist. LEXIS 30673 (N.D. Okla. Jan. 13, 2004); and 01-CV-891-H(C), Dkt. #737. The vacation order was entered pursuant to unopposed motion. *See Herd*, 01-CV-891-H(C), Dkt. #747. The July 11, 2003 order regarding causation was not withdrawn nor its legal reasoning altered in any way.

3. In addition, the State may prove its RCRA claim by circumstantial evidence. *See U.S. v. Valentine*, 856 F. Supp. 621, 627 (D.Wyo. 1994). More generally, it is well established that “[c]ircumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.” *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (citation omitted).

4. Previously, Defendants jointly, and the Cargill Defendants independently, argued that they were entitled to summary judgment because the State had failed to trace the contamination of the waters of the IRW to a precise source. *See* Dkt. ##2069 and 2079. The Court denied both motions. The heightened causation standard advocated by Defendants is plainly contrary to applicable Oklahoma and federal law. Therefore, Defendants’ arguments suggesting that the State must prove its case by direct evidence should be precluded.

WHEREFORE, premises considered, the State respectfully requests that the Court grant its Motion *in Limine* Pertaining to Defendants’ Arguments Suggesting that the State Must Prove its Case Through Direct Evidence (Dkt. #2423).

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